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IN THE

Supreme Court of the United States

BANK MARKAZI,
THE CENTRAL BANK OF IRAN,
Petitioner,

v.

DEBORAH D. PETERSON, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY FOR PETITIONER

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TABLE OF CONTENTS

		Page
I.	This Case Presents Important and Unresolved Questions About *Klein*'s Scope	2
II.	This Case Squarely Presents the Questions on Which Bank Markazi Seeks Review	6
III.	The Case's Foreign Relations Impact Underscores the Need for Review	10
Conclusion		12

TABLE OF AUTHORITIES

Page(s)

CASES

Calderon-Cardona v. *Bank of N.Y. Mellon*, 770 F.3d 993 (2d Cir. 2014) 10

Heiser v. *Islamic Republic of Iran*, 735 F.3d 934 (D.C. Cir. 2013) 10

Lebron v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374 (1995) 8

Miller v. *French*, 530 U.S. 327 (2000) 4

Nixon v. *Adm'r of Gen. Servs.*, 433 U.S. 425 (1977) 11

Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) 4

Pope v. *United States*, 323 U.S. 1 (1944) 5

Robertson v. *Seattle Audubon Soc'y*, 503 U.S. 429 (1992) ..... *passim*

United States v. *Klein*, 80 U.S. 128 (1872) ..... *passim*

Yee v. *Escondido*, 503 U.S. 519 (1992) 8

STATUTES

Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, § 502, 126 Stat. 1214, 1258 (codified at 22 U.S.C. § 8772) ..... *passim*

22 U.S.C. § 8772(a)(1) 1, 9

22 U.S.C. § 8772(a)(1)(C) 9

22 U.S.C. § 8772(a)(2) 1

22 U.S.C. § 8772(a)(2)(A) 7

22 U.S.C. § 8772(b) 1

22 U.S.C. § 8772(c)(1) 1, 4

28 U.S.C. § 1610(g) 10

TABLE OF AUTHORITIES—Continued

Page(s)

28 U.S.C. § 1610 note § 201(a) 10

U.C.C. art. 8 ..... 9, 10

TREATY PROVISIONS

Treaty of Amity, Economic Relations, and Consular Rights, U.S.-Iran, Aug. 15, 1955, 8 U.S.T. 899 10

Art. IV.1, 8 U.S.T. at 903 10

OTHER AUTHORITIES

Executive Order No. 13,599, 77 Fed. Reg. 6659 (Feb. 5, 2012) 11

2015 Daily Comp. Pres. Doc. 36 (Jan. 20, 2015) 11

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REPLY FOR PETITIONER

A statute that more blatantly attempts to dictate the outcome in a specific pending case would be hard to imagine. Section 8772 singles out this case by docket number—the "proceedings in the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518 (BSJ) (GWG)"—and expressly disclaims any effect on "any [other] proceedings." 22 U.S.C. §8772(b), (c)(1). "In order to ensure that Iran is held accountable for paying the judgments," it directs, the assets at issue must be paid over to plaintiffs subject only to findings that Bank Markazi has a beneficial interest in them and that no one else does. *Id.* §8772(a)(1), (2). If that does not constitute

an impermissible congressional exercise of the judicial power, it is hard to see what would.

Respondents do not seriously dispute the importance of the separation-of-powers question before the Court. They claim that this Court has already addressed the issue. That is incorrect. Their purported vehicle defects ignore the statute's effect and the court of appeals' reasoning. Finally, their half-hearted attempts to downplay this case's international ramifications are likewise without merit. The petition should be granted.

I. THIS CASE PRESENTS IMPORTANT AND UNRESOLVED QUESTIONS ABOUT *KLEIN*'S SCOPE

A. Respondents assert that this Court's cases already establish that Congress can direct the outcome of a pending case so long as it "'amend[s] applicable law'"—even if Congress amends the law solely for purposes of that one case, and even if the amendment leaves nothing for the judiciary to decide but uncontested collateral issues. Br. in Opp. 11. This Court's cases say no such thing.

The language about "amend[ing] applicable law" that respondents quote comes from the following passage of *Robertson* v. *Seattle Audubon Society*, 503 U.S. 429 (1992):

> We have no occasion to address any broad question of Article III jurisprudence. *The Court of Appeals held* that [the statute at issue] was unconstitutional under *Klein* because it directed decisions in pending cases without amending any law. Because we conclude that [the statute] *did* amend applicable law, *we need not consider whether this reading of Klein is correct.*

Id. at 441 (emphasis altered). *Robertson* thus did not hold that Congress can direct the outcome of a single

pending case so long as it "amend[s] applicable law." The Court held only that the *court of appeals'* ruling—that Congress had impermissibly directed the outcome of a case without amending applicable law—was incorrect *on its own terms* because Congress had in fact amended applicable law. *Ibid.*

Immediately after that passage, moreover, the Court noted an amicus's argument that "even a change in law * * * would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue in [a] pending case[]." 503 U.S. at 441. The Court "decline[d] to address" that argument because the parties had not raised it. *Ibid.* The Court would not have stated that it was "declin[ing] to address" that argument if, as respondents contend, the Court had already rejected the argument.

Nor did *Robertson* consider the particular defects at issue here. The findings Congress had reserved to the judiciary in *Robertson* were no mere makeweights. The statute "expressly reserved judgment upon 'the legal and factual adequacy' of the administrative documents" and "expressly provided for *judicial* determination of the lawfulness of * * * sales." 503 U.S. at 438-439. Here, by contrast, the statute directed the court to decide the case in plaintiffs' favor subject only to findings that the Second Circuit assumed to be foregone conclusions. Pet. App. 7a-10a.

The statute in *Robertson*, moreover, did not change the law solely for one case. The Court specifically explained that, although the statute "made reference to pending cases identified by name and caption number," it did so "only to identify the five 'statutory requirements that are the basis for' those cases." 503 U.S. at 440. Even if the new law was enacted with those pending

cases in mind, its effect was not limited to them: The law would have applied equally to any other case challenging the agency decisions based on those five statutory requirements. Here, by contrast, the statute expressly limits its application to this one case, disclaiming any effect on "any [other] proceedings." 22 U.S.C. §8772(c)(1).

Neither *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), nor *Miller* v. *French*, 530 U.S. 327 (2000), speaks to the question here either. In *Plaut*, the Court mentioned *Klein* in three sentences of dicta explaining why *Klein* involved a different separation-of-powers question. 514 U.S. at 218. The Court's passing reference to "amend[ing] applicable law" cannot reasonably be viewed as resolving the issue *Robertson* left open. See *ibid.* Respondents quote a footnote from *Plaut* for the notion that "'[e]ven laws that impose a duty or liability upon a single individual or firm are not on that account invalid.'" Br. in Opp. 17 (quoting 514 U.S. at 239 n.9). But the problem here is not that Congress singled out an "individual or firm" for liability. Congress purported to direct the outcome of a *single pending case*. That specificity creates distinct separation-of-powers problems because it constitutes an exercise of the judicial power to decide particular cases or controversies that Article III reserves to the courts.

Miller is further afield still. That case had nothing to do with legislation targeting a specific case. It involved a generally applicable statute that automatically stayed prison reform orders if the court did not decide a motion to terminate the order within 30 days. 530 U.S. at 333-334. The prisoners challenging the statute "concede[d]" that the provision would be valid under *Klein* if it amended applicable law, and the Court—accepting that concession—held that that is what it did. *Id.* at 349. The case

thus did not present the question left open in *Robertson*, and the parties did not litigate it.[1]

Simply put, this Court has never confronted, let alone upheld, a statute that changed the law solely for purposes of one case to ensure that the favored litigant prevailed. There is no practical difference between Congress changing the law solely for purposes of one case to make a party win and Congress directing the judiciary to rule for that party. Either way, Congress has exercised the judicial power that the Constitution reserves to the courts by adjudicating a particular case or controversy.

B. Respondents contend that the *lower* courts have rejected similar claims. Br. in Opp. 13-14. That is no reason to deny review. That lower courts have effectively read *Klein* out of the U.S. Reports only underscores the need for review.

This Court regularly grants review in separation-of-powers cases even absent a circuit conflict. Pet. 23 (collecting cases). Respondents do not contend otherwise. Nor do they dispute the importance of the constitutional questions. *Id.* at 22-23. Finally, they do not deny Congress's track record of testing separation-of-powers limits in terrorism suits against foreign sovereigns. *Id.* at 23-25. The importance of those issues warrants review regardless of what lower courts have decided.

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[1] Respondents invoke *Pope* v. *United States*, 323 U.S. 1, 11 (1944), for the proposition that a statute does not violate *Klein* even if it renders a party's claim "'uncontested or incontestable.'" Br. in Opp. 21. But *Pope* rested on Congress's plenary authority over payment of claims against the government. 323 U.S. at 9-10; see Pet. 31-32. No such authority is at issue here.

II. This Case Squarely Presents The Questions On Which Bank Markazi Seeks Review

Respondents also err in claiming that this case is a poor vehicle. This case squarely presents the issues for review.

A. Respondents contend that this case does not involve Congress's authority to dictate the outcome of a case subject only to findings on collateral uncontested issues, because the *district court* thought that Congress left "'plenty for [it] to adjudicate.'" Br. in Opp. 20-22 (quoting Pet. App. 115a). But that assertion is irrelevant. This Court reviews the court of appeals' judgment, not the district court's. And the court of appeals expressly held that "Congress may 'chang[e] the law applicable to pending cases,' *even when the result under the revised law is clear.*" Pet. App. 8a (emphasis added). The court acknowledged Bank Markazi's argument that § 8772 "effectively compels only one possible outcome, as Iran's beneficial interest in the assets had been established by the time Congress enacted § 8772." *Id.* at 10a. But the court deemed that argument irrelevant, holding it "foreclosed by * * * *Robertson*, as the statute there was specifically enacted to resolve two pending cases." *Ibid.* Indeed, the court thought "it would be unusual for there to be more than one likely outcome when Congress changes the law for a pending case with a developed factual record." *Ibid.*

The court of appeals thus did not base its holding on the notion that § 8772 left "plenty" for the courts to adjudicate. It assumed that Bank Markazi's description of the statute's effect was correct and held that, even so, the statute was constitutional. Respondents are correct that, "[w]hile the court of appeals did not dispute [Bank Markazi's] premise, neither did it adopt it." Br. in Opp. 21.

But that is precisely the point: Because the court of appeals "did not dispute" that the required statutory findings were makeweights, its decision stands for the proposition that Congress can change the law governing a case *even in those circumstances*. If this Court grants review and ultimately disagrees with that proposition, it will reverse the Second Circuit's decision and remand the case. The court of appeals' holding is thus squarely before the Court.

In any event, the district court's claim that §8772 left "plenty for [it] to adjudicate" is flatly wrong. The court claimed that it "could have found that defendants raised a triable issue as to whether the Blocked Assets were owned by Iran, or that Clearstream and/or UBAE have some form of beneficial or equitable interest." Pet. App. 115a. But there was never any dispute that Bank Markazi had a *beneficial interest* in the assets, which is all the statute requires. Pet. 20. Moreover, the court found that UBAE had disclaimed any interest, and that Clearstream lacked any interest as a matter of law. Pet. App. 111a-112a. Indeed, the statute expressly excludes a "custodial interest of a foreign securities intermediary * * * that holds the assets abroad for the benefit of Iran." 22 U.S.C. §8772(a)(2)(A). The assertion that the statute left "plenty" to adjudicate defies both the statute and the district court's own opinion.

B. Respondents assert that Bank Markazi did not squarely argue below that Congress cannot change the law solely for purposes of one case. Br. in Opp. 22-23. Not so. Bank Markazi expressly argued in its opening brief that §8772 violates the separation of powers by singling out this one case for disfavored treatment. "Section 8772," it explained, "requires that 'the financial assets that are identified in and the subject of proceedings in

the United States District Court for the Southern District of New York in Peterson et al. v. Islamic Republic of Iran et al., Case No. 10 Civ. 4518' 'shall be subject to execution' by Plaintiffs in this action." C.A. Br. 50 (emphasis omitted). "Congress's overt attempt in §8772 to determine the outcome of this case," Bank Markazi urged, "plainly 'usurp[s] the adjudicative function assigned to the federal courts under Article III.'" *Ibid.* Bank Markazi made the same point in reply, specifically quoting the passage from *Robertson* reserving this issue. See C.A. Reply 19 n.8 ("The *Robertson* Court expressly declined on procedural grounds to address whether 'a change in law, prospectively applied, would be unconstitutional if the change swept no more broadly, or little more broadly, than the range of applications at issue' in a particular case.").

That was more than sufficient to preserve the issue. Bank Markazi made its objection clear in its opening brief. That it waited until reply to cite the specific passage from *Robertson* describing the issue as unresolved hardly constitutes a forfeiture. Besides, "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee* v. *Escondido*, 503 U.S. 519, 534 (1992)). Here, the separation-of-powers claim is clearly presented. Whether Congress violated separation of powers by dictating the result in a single pending case or by changing the law in a single pending case to ensure that one party would win are at most different arguments supporting that same claim.

C. Respondents also assert that this case is a poor vehicle because it involves sovereign immunity, which the

political branches have discretion to withhold in individual cases. Br. in Opp. 23-25. But § 8772 does not merely strip the New York assets of immunity. It also abrogates *substantive* state property law by allowing respondents to seize the New York assets as if they were Bank Markazi's property.

Under U.C.C. Article 8, the New York assets were *not* Bank Markazi's property and thus were not available to satisfy Bank Markazi's debts (let alone Iran's). Bank Markazi's only property was the assets it held in Europe—assets that were beyond the district court's territorial authority to attach. Pet. 5-8. Section 8772 superseded those state-law principles by allowing respondents to seize assets "equal in value to a financial asset of Iran * * * that [a] foreign securities intermediary or a related intermediary holds abroad." 22 U.S.C. § 8772(a)(1)(C). The statute expressly "preempt[ed] any inconsistent provision of State law." *Id.* § 8772(a)(1).

Section 8772 thus rewrote *state property law*. That the statute *also* abrogated settled immunity principles may be an aggravating factor. But respondents are wrong to claim that only immunity is at issue.

D. Piling on one final (but equally meritless) vehicle issue, respondents claim that, even if § 8772 is unconstitutional, the assets are attachable under TRIA. Br. in Opp. 25-26. But the Second Circuit expressly declined to reach that issue. Pet. App. 5a. The remote possibility that the court of appeals might eventually decide the case on different grounds on remand does not make this case a bad vehicle for this Court to address the issue the court of appeals actually decided: the constitutionality of § 8772. Indeed, § 8772's central defect is that it foreclosed consideration of those general legal principles by dictating the outcome of the case.

In any event, TRIA does not apply here. That statute applies only to "*assets of* th[e] terrorist party." 28 U.S.C. §1610 note §201(a) (emphasis added). It thus requires *ownership*. See *Heiser* v. *Islamic Republic of Iran*, 735 F.3d 934, 941 (D.C. Cir. 2013) ("[P]laintiffs could not attach the contested accounts under [TRIA] without an Iranian *ownership interest* in the accounts * * * ." (emphasis added)); cf. *Calderon-Cardona* v. *Bank of N.Y. Mellon*, 770 F.3d 993, 1000-1002 (2d Cir. 2014) (same under 28 U.S.C. §1610(g)). Under U.C.C. Article 8, Bank Markazi does not *own* the assets that Clearstream holds at Citibank in New York; it merely has a beneficial interest in them. Pet. 5-8. Under TRIA, that is not enough.

III. The Case's Foreign Relations Impact Underscores The Need For Review

Respondents barely acknowledge this case's serious international ramifications. They do not even address its impact on the Nation's reputation as a safe custodian for central bank reserves. Pet. 29-30. Nor do they mention the potential for retaliatory legislation by other governments. Pet. 30-31. Those impacts alone underscore the case's importance.

Respondents briefly mention the Treaty of Amity. Br. in Opp. 28. But even there, they offer no substantive response. They dismiss Bank Markazi's analysis as "ironic," *ibid.*, but nowhere defend the Second Circuit's rationale. Nor could they: A statute that singles out an Iranian entity's interests for special, disfavored treatment—precisely because the entity is Iranian—self-evidently violates Article IV.1's prohibition on discriminatory measures. Pet. 25-26. And respondents do not deny that such Treaty breaches expose the United States to claims before international tribunals. *Id.* at 27.

The decision below also thwarts the President's control over foreign affairs. The President reiterated that point in his 2015 State of the Union address: "Our diplomacy is at work with respect to Iran, * * * [b]ut *new sanctions * * * will all but guarantee that diplomacy fails* * * *." 2015 Daily Comp. Pres. Doc. 36, at 7 (Jan. 20, 2015) (emphasis added). Ad hoc legislation transferring nearly $2 billion of assets to Iran's judgment creditors, without regard to settled legal principles, will undoubtedly complicate those diplomatic efforts. It will also undercut international confidence in one of this Nation's greatest assets: governance through the rule of law administered not by the legislature but by an impartial judiciary.

Respondents assert that the President implicitly endorsed § 8772 by not vetoing the statute and by blocking the assets. Br. in Opp. 27. But § 8772 was merely one provision in a much larger bill. See Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112-158, 126 Stat. 1214 (Aug. 10, 2012). "[T]hat [the President] signed [an] Act does not mean that he necessarily approved of its every detail. Political realities often guide a President to a decision not to veto." *Nixon* v. *Adm'r of Gen. Servs.*, 433 U.S. 425, 491 (1977) (Blackmun, J., concurring in part). The blocking order is even less relevant. The President issued that order *before § 8772 was enacted.* Executive Order No. 13,599, 77 Fed. Reg. 6659, 6659 (Feb. 5, 2012).

If the Court has any doubt on the Executive Branch's position, it should call for the views of the Solicitor General. While the Executive Branch has a duty to defend statutes where possible, Br. in Opp. 27-28 n.11, that does not preclude it from addressing the *importance* of the issues or the desirability of review. Given the substantial

international ramifications at stake, the Court would benefit from the Executive Branch's views.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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